

Edinburgh, October 18. 1769.

# A N S W E R S

FOR THE

OFFICERS OF STATE,

TO THE

PETITION of HENRY DUKE of BUCCLEUGH.

SIR John Kerr, proprietor of the barony of Ewesdale, which 1620. he held ward of the Crown, sold it to Walter Earl of Buccleugh for 160,000 merks; and in the contract of sale, which contained a procuratory of resignation, he became bound to infeft the Earl either *a me* or *de me*, to be held of him, for payment of a feu-duty of 160 merks; and he farther became bound, that he and his heirs should not lie forth unentered, but enter timeously to the superiority, in case the Earl should chuse to hold the lands of him and his heirs; and that he should convey to the Earl and his successors all casualties of superiority whatever that might fall, and receive the Earl, his heirs, and singular successors as vassals in the lands *gratis*: And, it was also provided in the contract, that the not payment of the feu-duty for two or more years, should be no cause of nullity or reduction, notwithstanding of any law or statute to the contrary.

A

Sir



July 20,  
1610.  
Jan. 31<sup>st</sup>.  
1621.

Sir John, of the same date, granted a feu charter in implement of the contract, upon which the Earl was infest; and the year following, Sir John granted a perpetual discharge of the feu-duty to the Earl.

This mode of holding the lands was probably made choice of for the purpose of limiting the casualty of ward to the feu duty, untill a favourable opportunity should occur for getting the tenure as to the crown changed from a ward holding to a feu or blench holding.

Ann Countess of Dalkeith, the heiress of the Buccleugh estate, intermarried with the Duke of Monmouth, and in her marriage-contract she provided and granted procuratory for resigning the estate in favour of herself and husband in conjunct fee, and the heirs of the marriage, &c. And accordingly, a charter was expedited under the great seal, containing a *novodamus*, granting many new rights and privileges; and, *inter alia*, many lands held ward were changed into blench and feu-holdings: and more particularly, the lordship or barony of Ewesdale was comprehended in this charter, and made to be holden feu of the Crown: ‘Reddendo pro praedict. terris et dominio de Ewesdale, jacen. &c. nobis et successoribus nostris, aliisve jus haben. pro tempore, sumnam unius centum et sexaginta mercarum monetae Scotiae, ad dictos duos anni terminos, Pentecostes et Sancti Martini, per aequales portiones, nomine feudifirmi tantum,” &c.

This lady afterwards, when Duchess of Buccleugh, expedited another charter of the estate upon her own resignation, in which the *reddendo* clause, as to the lordship of Ewesdale, is conceived in the very same words with the preceeding charter; and the same words are used in all the subsequent investitures of the estate till 1742, when the late Earl of Dalkeith, father to the Noble petitioner, expedited a charter of the estate, wherein the words of the *reddendo* clause, *aliisve jus habentibus pro tempore*, are omitted; and they are likewise omitted in the retour of the petitioner’s special service anno 1751, as heir to his father in the estate.

The



The proper officer in the court of exchequer having, in the course of his duty, discovered various omissions in making up the King's property-rolls, and among others, that the feu duty of Ewesdale had not been therein stated, he did make these omissions known to the barons of exchequer, who directed that the petitioner should be charged with the feu duty of 160 merks.

The Duke, willing to avoid payment of the feu-duty, and for that purpose to avail himself of the late statute for taking away ward holdings, did apply by petition to the barons of exchequer, to be relieved from the payment of the feu duty of 160 merks, upon this ground, that the changing of the holding of Ewesdale from ward to feu in a charter passed upon the resignation of Ann Countess of Dalkeith, was altogether erroneous and ineffectual, because Ann Countess of Dalkeith was not the vassal of the Crown in that lordship when the resignation was made; and therefore, that he ought to be entitled to the benefit of the statute, in the same manner, as if his lands had been held ward by the investitures to this day.

The Duke's defence against payment resolving into a question in law, the case was laid before the King's counsel, who being of opinion, that after the lands had been held of the Crown by a feu tenure for so many years, the Duke was not entitled to return to the ancient tenure of ward, and to take the benefit of the late act of parliament; the question was argued by counsel before the Barons, who pronounced a judgement upon the petition, in effect the same with those pronounced by your Lordships in this action.

The Duke afterwards instituted the present action in this court for having it found and declared, that the change of the holding, and *reddendo*, was owing to a mistake; and that, in terms of the late tenure act, he is entitled to hold the barony of Ewesdale blench, and to be freed from the payment of all feu-duties by-gone and to come.

The cause was heard before the Lord Auchinleck; and his Lordship having reported it upon informations, your Lordships found,  
' That



‘ That the pursuer is not entitled to demand a charter from the  
 ‘ Crown of the lordship of Ewesdale holding blench, and remitted  
 ‘ to the Ordinary to proceed accordingly, and also to hear parties  
 ‘ further with respect to the feu-duties of the said lands, and  
 ‘ to do as he shall see just.’

The Duke preferred a reclaiming petition against this interlocutor; but the case appearing to be clear, your Lordships refused the petition, without putting the defenders to the trouble of answering it.

When the matter remitted to the Lord Ordinary came to be heard, the Noble petitioner attempted in some degree to change the shape of his cause; and for that purpose did make the following amendments to the conclusions of his libel: ‘ Or, supposing it  
 ‘ should be found, that the pursuer is not entitled to hold the  
 ‘ said lands and lordship blench of the crown, yet that the fore-  
 ‘ said feu duty of 160 merks is not exigible by, or payable to the  
 ‘ crown; nor does it in any way belong to them, but to the pur-  
 ‘ fuer himself, as in right of Sir John Kerr, in virtue of the contract  
 ‘ with him *anno* 1620, and perpetual discharge of said feu duty  
 ‘ granted by Sir John Kerr to the Earl of Buccleugh, *anno* 1620,  
 ‘ both before recited, which is supported and confirmed by the  
 ‘ words of the *reddendo* of the charter 1664, *aliisve jus haben. pro*  
 ‘ *tempore*, and subsequent rights; and consequently, that the pur-  
 ‘ fuer is not bound to account in exchequer for the said feu-duty,  
 ‘ either for by gones or in time to come, but to retain, and apply  
 the same for his own proper use and behoof.

The Lord Ordinary, after hearing counsel, having reported that branch of the cause, your Lordships pronounced the interlocutor petitioned against: ‘ On report of Lord Auchinleck, and having  
 ‘ advised the informations and minutes *hinc inde*, the Lords find,  
 ‘ That the pursuer is liable in payment to the Crown, superior of  
 ‘ the lordship of Ewesdale, of 160 merks Scots yearly, as the feu-  
 ‘ duty thereof as to time to come, and that he is bound to ac-  
 ‘ count in exchequer for the same; and assilzie the Officers of  
 ‘ state from the conclusion of the pursuer’s declarator as to by-  
 ‘ gones



'gones of the said feu duty, and remit to the Ordinary to proceed accordingly.'

The argument maintained in the petition for obtaining an alteration of this interlocutor, is in substance, That the resignation made by Countess Ann of the lordship of Ewesdale, was altogether erroneous, as she was not the vassal of the Crown in these lands, nor had established a right to the procuratory of resignation contained in the contract of sale 1620: That the change of the holding from ward to feu was equally erroneous, as that was not intended, and could not be done: That all these blunders and errors proceeded from Countess Ann's marriage contract having been framed at London by the advice of the bridegroom's, and not of the bride's friends, who were unacquainted with the tenures of the estate, and from Sir John Gilmour, the then Lord President of this court, who was called to London to give advice in the execution of the marriage articles, not being sufficiently informed; and that, as the writer of the charter was so cautious as to make the feu duty of 160 merks for the lordship of Ewesdale, payable to the King and his successors, *aliisve jus habentibus pro tempore*, the charter must be construed to import an obligation for payment of the feu duty to Sir John Kerr, as the person who had right to it by the contract of sale, and must operate an extinction of that feu duty to the petitioner, he having come in Sir John Kerr's place, as to the feu duty, by virtue of the perpetual discharge which was granted of it by Sir John Kerr in 1621.

The respondents, without investigating whether errors were committed in passing the charter 1664, or into the causes of those errors, or into the meaning and intendment of the writer of the charter 1664, have this irresistible answer to the whole of the petitioner's argument, That a feu duty is *essential* in the constitution of a feu-holding. It cannot exist without it: That as *de facto*, the holding of the lordship of Ewesdale was changed from a ward to a feu, for the payment of a feu duty of 160 merks, and that it is now adjudged, that the petitioner is not entitled to demand a charter of a different holding, it must follow of necessary consequence,



sequence, that the feu-duty must be payable to the Crown; more especially as no other consideration appears in the charter for the change made of the holding.

The respondents might with safety rely upon this general answer to the argument in the petition; but they shall submit to your Lordships some more particular reasons which operate in support of the general answer, and of the interlocutor petitioned against. And,

*1mo*, There is no kind of certainty, that the resignation made by Countess Ann was erroneous. She might have vested a right to the procuratory in the contract sale 1620, and thereupon obtained a charter of resignation from the crown; altho' such charter does not now appear, as the registration of charters from the crown was not ordered till the 1672. If this was done, the charter 1664 was perfectly regular; nay, that charter was effectual in law, if Countess Ann ever established a right to the procuratory in the contract of sale by a general service. For altho' such general service is not mentioned in the charter 1664, yet that charter was effectual, if the right of resignation was in Countess Ann by the procuratory in the contract of sale.

*2do*, The respondents cannot understand how the feu-duty in the charter 1664, could be made payable to Sir John Kerr, who was not a party to that charter.

The petitioner, in answer to this, says, That it is customary in charters of church-lands, to make the feu duties payable to the crown, altho' the lords of erection have a right to them.

But the difference lies in this, that when the superiority of church-lands erected into temporal lordships, and the feu duties belonging to them, were annexed to the crown, a right to the feu-duties was reserved to the Lords of erection, and the vassals were ordered to pay their feu-duties to the Lords of erection until they were redeemed; whereas in the present case, Sir John Kerr, nor no person in his right, could ever be entitled to claim a feu duty in a charter from the crown, to which no statute or private deed whatever had given him a right.

*3tio*,

1630. c. 10.  
1634. c. 14.  
par. 1661.  
c. 60.



3<sup>to</sup>, As Sir John Kerr had extinguished the claim of feu duty, competent to him in the feu charter which he granted in implement of the contract of sale, by a perpetual discharge, it cannot be understood, that the words *aliisve jus habentibus pro tempore*, were meant to relate to him, who had no right whatever.

4<sup>to</sup>, Several charters were formerly condescended upon, as well of church lands as of other lands, wherein the feu-duty is made payable to the King and his successors, *aliisve jus haben. pro tempore*. Now, it is evident from these charters, that no person could be entitled to claim the feu duties, excepting either the Lords of erection, who had right by special acts of parliament, or those who had come in the place of the crown by grant or office, which is admitted in the petition, and from which the respondents draw this conclusion, that the words *aliisve jus habentibus pro tempore*, in this case, could only mean Lord Rothes, who had got a gift of Countess Ann's ward, or the officers of the crown who should be appointed to uplift and discharge the feu duties, or the persons to whom the feu duties should belong by special grant.

It is indeed true, that, prior to the charter 1664, Lord Rothes had conveyed his gift of ward to Countess Ann; but this might not be known to the writer of the charter; and if it had, it was still proper to insert the clause, as the feu duty might be granted away by the crown, or an officer might be appointed for uplifting it; at least this may be presumed to have been the intention of the parties, when the same words appear to be used in other cases which will admit of no other meaning.

5<sup>to</sup>, The application of the words *aliisve jus habentibus* to Sir John Kerr, is destroyed by the same words being used in the same charter, with regard to the lands of Branxholm.

But, says the petitioner, these words, when applied to the lands of Branxholm, could not possibly relate to Lord Rothes's gift of ward; because that part of the lands to which the words apply were held blench and not ward.

The respondents, in answer, first, oppose the words of the charter which runs thus, 'Reddendo annuatim memorat. Jacobus  
' dux



' dux de Buccleugh et Anna Ducessa de Buccleugh, eorumque sur-  
 ' pra mentionat. nobis et successoribus nostris, *aliisve jus haben.*  
 ' *pro tempore*, pro praedict. viginti quatuor mercat. terrarum et  
 ' baroniae de Branxholm, &c. unam rubram rosam ad festum  
 ' Sancti Joannis Baptistae, nomine albae firmæ, si petatur tantum,  
 ' *tanquam antiquam divo iam* pro praedictis terris solvi solit. Et  
 ' *pro reliquis terris domini* et baroniae de Branxholm, Ecfoord,  
 ' Buccleugh, Lantoun, Lempitlaw, Rankellburne, Kellrig, Kir-  
 ' kurd, Greenwood, et suis pertinen. *unum denarium* monetae Sco-  
 ' ticae ad festum Pentecostes, nomine albæ firmæ, apud praedict.  
 ' turrin et fortalitium de Branxholm, si petatur tantum; non  
 ' obstante quod praedict. *reliquae terrae*, dominia, et baronia de  
 ' Branxholm, Ecfoord, aliaque immediate supra specificat. per  
 ' praedict. Ducissam de Buccleugh, ejusque praedecessores, de no-  
 ' bis et successoribus nostris, *in taxata warda tenta fuerunt*, pro an-  
 ' nua solutione ducentarum librarum monetae dict. regni Scotiae,  
 ' ad festum Pentecostes et Sancti Martini, per aequales portiones an-  
 ' nuatim, durante warda et non introitu, et L. 200 monetae prae-  
 ' dict. pro relevio, cum contigerit, una cum summa L. 1000 mone-  
 ' tae supra mentionat. pro maritagio.' And 2dly, They say, that  
 whether the words shall be understood to relate to Lord Rothes's  
 gift or not; yet still they show, that Sir John Kerr could not be  
 the object of these words, as he never had any connection what-  
 ever with the lands of Branxholm.

The petitioner puts the case, that the ward tenure had not been  
 abolished, that the land had been purchased by his grand father,  
 who erroneously obtained a charter of resignation, as he supposes  
 Countess Ann to have done; and that his man of business had  
 fallen into the same blunder of making him expedite a charter, con-  
 taining the same relative words as to the feu-duty; he then asks  
 whether, upon making a discovery of the blunder, he would not  
 have been entitled to relief?

The answer is plain, that if the challenge was made within the  
 years of prescription, the petitioner would have been entitled to  
 relief; but that could not have been done by a continuation of the  
 feu-holding



feuholding and a discharge of the feu duty. The proper and only redress would have been the setting aside the erroneous charters, and allowing the petitioner to hold the lands ward, as they had been held formerly.

In the present case, if the petitioner had made his challenge within the years of prescription, or if your Lordships had found him entitled to redress, notwithstanding the years of prescription being run, you only could have done it by reducing the charter 1664, and all subsequent investitures, and allowing the petitioner, after vesting a right to the procuratory in the contract of sale with Sir John Kerr, to expedite a charter upon that procuratory; but your Lordships have already found, that the petitioner is not entitled to do so; and it follows of consequence, that if he must continue the holding he has got, he must pay a feu-duty, that being essential to the nature of the holding; for otherways he would hold feu, without payment of any feu duty; and there is no other feu-duty can be paid but the 160 merks.

Again, the petitioner supposes, that Sir John had not discharged the feu-duties, and that the present question had been a competition between Sir John and the crown for the feu duties; and he says, it is plain, that Sir John would have been preferable to the crown; because the crown could not have pleaded an exclusive title, the words *aliiſve jus habentibus*, being common to Sir John with the crown; and that the crown could not have pleaded possession, as the crown has never uplifted the feu duty.

The respondents apprehend the reverse to be clear, and that the crown, in the case supposed, would have been preferred to the feu-duties, for this simple and clear reason, that the feu duty is the *only* consideration appearing in the charter for a change of the holding; and that the change could not be allowed to remain without the feu-duty, which is essential for the subsistence of a feu-right, being payable to the superior; and to which this other reason may be added, that Sir John's feu-charter could never be a title for his claiming a feu duty, stipulated in the charter from the crown to Countess Ann, to which charter he was no party, and to whose right to a



feu-duty arising from the contract of sale the charter had no express relation.

It is true indeed, that the crown has not been in possession by uplifting the feu-duty; but the crown has acted as superior in the renovation of the various investitures that have been made since the 1664; each of which is an act of possession, and makes the plea of prescription operate as strongly for the crown, as if the practice had been to uplift the feu-duties regularly; but truly the sufficiency of the crown's right as to a continuation of the holding, is already ascertained by the first judgment of the court; and the only question in the case supposed, would be, whether in a feu holding the superior is entitled to the feu-duty, or a person who is no party to the charter which constitutes it, and who has no right from the crown, who grants the charter?

The respondents shall only further observe upon this case, that if the late tenure act had never been made, the change of holding would have been very beneficial for the petitioner; and as, in that case, it would not have been in the power of the crown to have compelled the petitioner to return to a ward holding; so it is perfectly just, and attended with no kind of severity, that the petitioner should be bound to pay the feu-duty, which was the only consideration given for a change of the holding.

*In respect whereof. &c.*

JA. MONTGOMERY.



